CIV/APN/229/93

IN THE HIGH COURT OF LESOTHO

In the matter between

SEMAKALENG KHONGOANYANE	**1ST APPLICANT**
TS'EPO 'NEKO	**2ND APPLICANT**

and

THE DIRECTOR OF PRISONS	**1ST RESPONDENT**
THE DEPUTY DIRECTOR OF PRISONS	**2ND RESPONDENT**
THE MINISTER OF JUSTICE AND PRISONS	**3RD RESPONDENT**
THE ATTORNEY GENERAL	**4TH RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi, Acting Judge
On 13th day of December, 1996.

This is an application brought on Notice of Motion for an order in the following terms:-

"1. Declaring the purported dismissal of Applicants by 2nd Respondent unlawful, null and void and of no legal force and effect;

2. Directing the Respondents to reinstate Applicants to their respective offices. **Alternatively** to pay the Applicants all their terminal benefits;

3. Directing the Respondents to pay the Applicants their salary from the date of the purported dismissal to that of reinstatement;

4. Directing the Respondents to pay costs hereof;

5. Granting Applicants further and/or alternative relief."

The founding affidavit to this application is deposed to by the 1st Applicant Semakaleng Khongoanyane who states as follows in paragraphs 8 - 10 of his affidavit:-

"8

The 2nd Applicant and I have at all material times hereto been in the employ of the 3rd Respondent's Ministry in the department of Prisons. I have 18th years service in this department whilst 2nd Applicant has less than that. Both of us were at all material times hereto in Maseru Prison Offices. 2nd Respondent was a Trooper whilst I was a Corporal.

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On or about the 31st August, 1992, the 2nd Applicant and I were interdicted on half pay for an alleged contravention of Section 156(b) and (7) of the Prisons Proclamation No. 30 of 1957. We were interdicted by 2nd Respondent and copies of letters of interdiction are hereto annexed and marked **"A"** collectively.

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After the interdiction aforesaid the 2nd Applicant and I were charged with breach of discipline it being alleged that we were in breach of Section 156(6) and (7) of the Prison Rules. We pleaded not guilty but were eventually found guilty by the Presiding Officer who recommended that we be dismissed."

It is significant that in paragraph 5 of his opposing affidavit Moses Motsiri Moloinyane unreservedly admits the contents of the above mentioned paragraph 5. I find therefore that those averments stated therein are indeed common cause.

Nor do I find that there is any dispute at all about Semakaleng Khongoanyane's averments in paragraphs 11 and 12 of his founding affidavit wherein he states as follows:-

"11

Despite the conviction and recommendations aforesaid, the 2nd Applicant and I were on the 30th November, 1992, reinstated on full pay and were paid part of our salary which had not been paid during the period of interdiction. Copies of letters of reinstatement are hereto annexed and marked **"B"** collectively.

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On the same day the 30th November, 1992, the 2nd Applicant and I were dismissed summarily by 2nd Respondent purportedly for our alleged **"contribution to an escape of prisoner."** Copies of letters of dismissal are hereto annexed and marked **"C"** collectively."

The said letters Annexture "C" collectively written to the applicants are in fact identical and state as follows to each of the Applicants:-

"Dear Sir,

DISMISSAL NO. 8608 S.A. KHONGOANYANE

DISMISSAL NO. 9950 S.T. 'NEKO

This Office is aware without doubt that your carelessness, negligence and failure to follow procedure and proper supervision, you contributed to the escape of Prisoner (Remand Murder).

You are therefore dismissed from the Service with effect from 1st December, 1992. Your last date of Service will be 30th November, 1992.

M. MOLOINYANE
DEPUTY DIRECTOR OF PRISONS

CC ACGEN
AUDIT
PUBLIC SERVICE (PERSONNEL)
TOKA."

In paragraph 6 of his opposing affidavit Moses Motsiri Moloinyane tries to justify his action of reinstating the applicants and dismissing them on the same day by claiming ignorance of the law and that be thought in law he could not dismiss the applicants while they were still on interdiction without reinstating them first.

The most material averments as far as this application is concerned appear in paragraph 13 of the founding affidavit of Semakaleng Khongoanyane who deposes therein as follows:-

> "I verily aver that 2nd Respondent had no power in terms of the Prisons Amendment Order 1970, to remove both 2nd Applicant and I from Office. This power is vested in the 1st Respondent and no other person."

It is quite significant that in paragraph 7 of his opposing affidavit the said Moses Motsiri Moloinyane actually concedes that he had no power to dismiss the applicants. He puts it in the following terms:-

> "7. AD PARA 7. I am advised that I had no power to dismiss."

Indeed I observe that even in paragraph 9 of his opposing affidavit Moses Motsiri Moloinyane reiterates his view that the dismissal of the applicants was in fact unlawful. He states therein in part:-

> "9. Notwithstanding that the dismissal was unlawful as indicated in para 7 above, applicants cannot be reinstated in view of the seriousness of the offence they committed."

Well for my part I find that the alleged seriousness of the offence is of no consequence in view of the admitted fact that the applicants were in fact reinstated in their respective offices nonetheless.

It was against the above mentioned background that on 2nd August 1993 the respondents strangely filed a Notice of Motion seeking for an order couched in the following terms:-

"1. Applicants/Respondents be granted leave to amend the opposing affidavit of Moses Moloinyane filed of record in the main application.

2. Respondents be ordered to pay costs hereof only in the event of opposing.

3. Granting Applicants further and/or alternative relief. And that the accompanying affidavit attached hereto will be used in support of the application."

The application for amendment of the opposing affidavit of Moses Moloinyane is strenuously opposed on the predictable ground that it is "misconceived in as much as an affidavit constitutes evidence and cannot in terms of the Rules be amended."

The aforesaid application for amendment was argued before me on 29th November 1996 before the main application herein. Mr.Putsoane who appreared for the respondents and who admitted drafted the said notice of application to amend the opposing affidavit of Moses Moloinyane was soon confronted with Rule 33(1) of the High Court Rules which reads as follows:-

"Any party desiring to amend any pleading or document, other than an affidavit filed in connection with any proceeding, may give notice to all other parties to the proceeding of his intention so to amend." (My underlining).

In my view this Rule is stated in clear and unambiguous terms that an affidavit is not such a pleading or document that can be amended. This is precisely because in motion proceedings an affidavit itself constitutes evidence and proof of what it contains.

In Steven Mokone Chobokoane v A.G. C of A (CIV) No. 15 of 1984 Aaron JA had this to say on this issue "the affidavit made by the appellant (applicant) constitutes not only his allegations but also his evidence ..... In other words the affidavit itself constitutes proof, and no further proof is necessary."

I respectfully agree. I am of the view therefore that to allow an amendment of the said affidavit would not only be improper but would literally amount to the sanctioning of perjury. This is to be avoided at all costs.

Indeed Mr. Putsoane was unable to refer me to any authority that entitles a litigant to amend his own affidavit. For my part I find that this is a novel application to say the least and I am satisfied that it amounts to abuse of court process. I am fortified in this view by the fact that Mr. Putsoane arrogantly persisted with the application despite the fact that his attention was drawn to the said Rule 33 (1) of the High Court Rule. This Court was certainly not amused and will accordingly mark its displeasure at this type of attitude by making an appropriate order as to costs as hereinunder stated.

To aggravate the matter Mr. Putsoane then sought to mislead the court by arguing at length that the application before me was infact one for leave to file further affidavits. I do not agree and it is precisely for this reason that I have reproduced the prayers in full in the said application for amendment in order to indicate that what was sought was an amendment to the opposing affidavit of Moses Moloinyane and nothing else.

I feel it has to be recorded that this court was struck by the frivolity and vexatiousness of this application for amendment of Moses Moloinyane's affidavit. Not only was the application slackly presented but the court was also treated in a cavalier manner bordering on disrespect to the court. Indeed Mr. Phafane submitted as much.

In the circumstances I accordingly dismissed the application for amendment of Moses Moloinyane's affidavit with costs on attorney and client scale.

I turn then to deal with the main application.

As earlier stated it is common cause that the dismissal of the applicants was in fact unlawful. This is because the purported dismissal was made by the 2nd Respondent who is only the Deputy Director of Prisons. I observe that even in his letters of dismissal of the applicants Annexture "C" collectively the said Moses Moloinyane who wrote the letters clearly describes himself as Deputy Director of Prisons. He has not signed as Director or as Acting Director of Prisons as such.

Now Section 3 of The Prisons (Amendment) Order No. 30 of 1970 provides as follows:-

> "3. The power to appoint a person to hold or act in an office of the rank of Senior Chief Officer or below (including the power to confirm appointments and to appoint by way of promotion), the power to exercise disciplinary control over person holding or acting in such offices and the power to remove such persons from office shall be exercised by the Director of Prisons without consultation with the Public Service Commission."

I attach due weight to the fact that this section is framed in mandatory terms conferring the power to dismiss on the Director of Prisons himself and no one else. I also observe that there is no section delegating the power to dismiss upon the Deputy Director of Prisons.

I am satisfied therefore that by purporting to dismiss the Applicants from their respective offices the 2nd Respondent acted ultra vires his powers and that consequently such dismissal is unlawful, null and void and of no legal force and effect. I find that what

the 2nd Respondent purported to do was a material breach of the aforesaid Section 3 of the Prisons (Amendment) Order No. 30 of 1970,

See Lesotho Telecommunications Corporation v Thahamane Rasekila C of A (CIV) No. 24/91. See also Mpho Qhobela v Attorney General CIV/APN/229/85 per Kheola J as he then was.

Mr.Phafane has abandoned the alternative prayer in prayer 2 as well as prayer 3 in the Notice of Motion. I consider that this concession was properly taken since I am of the view that it would not be proper for this court to order the respondents to pay the applicants their salary from the date of their purported dismissal to that of their reinstatement without knowing whether the applicants were employed during the relevant period and if so what they earned in other occupations. This should always be taken into account in order to avoid double payment which of course would be inequitable.

See Lesotho Telecommunications Corporation v Thahamane Rasekila (supra).

In the result therefore the application is granted in terms of prayers 1 and 2 (in the main) of the Notice of Motion with costs.

M.M. Ramodibedi

ACTING JUDGE

13th day of December, 1996

For Applicant : Adv. Phafane

For Respondents: Mr. Putsoane